ORAL ARGUMENT NOT YET SCHEDULED

No. 14-1029
No. 14-1057

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Lucky Cab Company
Petitioner/Cross-Respondent

v.

National Labor Relations Board
Respondent/Cross-Petitioner

ON PETITION FOR REVIEW AND CROSS-APPLICATION FOR ENFORCEMENT OF A DECISION AND ORDER OF THE NATIONAL LABOR RELATIONS BOARD

REPLY BRIEF OF PETITIONER/CROSS-RESPONDENT LUCKY CAB COMPANY

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GLOSSARY OF ABBREVIATIONS

Abbreviation	Definition
The Act or NLRA	National Labor Relations Act
The ALJ	Administrative Law Judge Lana H. Parke
The Union	Industrial, Technical and Professional Employees Union, Local 4873
The Board or NLRB	National Labor Relations Board
The Board's Decision or Decision	The Decision and Order of the Board under review
JA	Joint Appendix
Lucky Cab	Lucky Cab Company
GC	The Board's General Counsel and Trial Attorneys
Section 7	29 U.S.C. §157
Section 8(a)(1)	29 U.S.C. §158(a)(1)
Section 8(a)(3)	29 U.S.C. §158(a)(3)
Section 10(c)	29 U.S.C. § 160(c)
The NTA	The Nevada Taxi Authority

I. SUMMARY OF REPLY ARGUMENT

Lucky Cab discharged six taxi cab drivers who ***admittedly*** engaged in violations of Company rules of which they were well aware. This is not in dispute. Lucky Cab also had no knowledge that any of these drivers were "spearheading" a union campaign, as General Counsel ("GC") claims in his brief. (GC Brief at 31) Lucky Cab had no knowledge of the existence of any kind of union campaign at the time the first two of these individuals were terminated. In fact, ***the National Labor Relations Board ("Board") below recognized that there is no evidence of management knowledge of any of the drivers' union activities prior to their terminations***. The discharged drivers testified that they conducted their union activities off-site and deliberately concealed their activities from management. Three testified ***denying*** that management could have observed any of their alleged union supporting activities. These facts are absolutely fatal to the finding of retaliation by the Board in this case.

Despite the drivers' separate admissions of wrongdoing, the surreptitious nature of the organizing campaign and the lack of evidence demonstrating knowledge of their alleged union activities, GC would have this Court believe that Lucky Cab discharged all of them based a theory of retaliation that the drivers themselves did not assert at the times of their discharges. None claimed in their termination paperwork that they believed their discharges resulted from union

supporting activities. The theory of retaliation in this case contradicts much of the drivers' own testimony, is based on false assumptions and alleged union animus which itself cannot be maintained. That Lucky Cab did not discharge numerous other known union supporters who engaged in more vocal expressions than the alleged discriminatees here also renders GC's arguments disingenuous. GC cannot and does not justify the Board's decision ignoring considerable evidence that other employees had been terminated for the same reasons given to the drivers at issue in this case, long before the existence of an organizing campaign.

The Board's decision, and GC in his brief, ignore the burden of proof and seek to impute an unlawful motivation for the discharges based solely on speculation and innuendo. The Board's speculative inferences inverted the burden of proof and improperly required Lucky Cab to prove a negative – that retaliation did not occur. The Board's own precedents do not support its own position below. Its decision is not supported by substantial evidence. Lucky Cab's petition for review should be granted and the Board's decision should be denied enforcement.

II. ARGUMENT

A. GC Did Not Demonstrate A *Prima Facie* Case Of Retaliation Against Any Of The Discharged Drivers.

Under the Board's *Wright Line* burden-shifting scheme, GC must establish a *prima facie* case to support the inference that protected, concerted activity motivated an adverse employment action. 251 NLRB 1083, 1086 (1980). To meet

that burden here, GC must show: (1) Lucky Cab's knowledge of each driver's protected activity; (2) anti-union animus toward each driver's protected activity; and (3) that each driver suffered an adverse employment action because of, and in retaliation for, his or her protected activity. *See Central Plumbing Specialists*, 337 NLRB 973, 974 (2002). Only if GC proved by a preponderance of the evidence that protected conduct was a motivating factor for each driver's termination would the evidentiary burden shift to Lucky Cab to establish that it would have taken the same action regardless of the existence of the protected activity. *Wright Line*, 251 NLRB at 1087; *U. S. Postal Service*, 350 NLRB 441 (2007).

As the Board held somewhat recently in *St. Bernard Hospital*, 360 NLRB No. 12, n.2 (2013), *Wright Line* is inherently a causation test. As such, "[t]he ultimate inquiry" is whether there is a nexus between employees' protected activity and the adverse employer action in dispute. *Chevron Mining, Inc. v. NLRB*, 684 F.3d 1318, 1327-1328 (D.C. Cir. 2012). Accordingly, not just any evidence of animus borne against employee protected activity will satisfy the initial *Wright Line* burden of proving unlawful motivation. *See, e.g., Roadway Express, Inc*., 347 NLRB 1419, 1419 fn. 2 (2006) (Board found that, although there was some evidence of animus in the record, it was insufficient to sustain the General Counsel's initial *Wright Line* burden of proof); *Atlantic Veal & Lamb, Inc.*, 342 NLRB 418, 418-419 (2004) (Board found insufficient facts to show that the

employer's animus against employee's union activity was a motivating factor in the decision not to recall him). A determination that management acted with an unlawful motivation must be based on evidence linking its demonstrated animus to the specific adverse employment actions at issue.

Because GC's Brief mischaracterizes the evidence in this case, the following is a brief recitation of the discharge decisions at issue here:

- On February 24, 2011, Almethay Geberselasa was discharged for picking up customers in violation of her geographically restricted medallion. (JA-1084-89) Geberselasa acknowledged her misconduct, contended she violated the geographic restriction in order to "make book," and declined to provide any further excuse when given the opportunity by management to do so. (JA-0501, 249, 0252, 0261-62, 282) Undisputedly, Lucky Cab previously discharged another driver for the same reason as the one provided to her. (JA-2169-72)

- On February 25, Elias Demeke was discharged for trip sheet falsification. (JA-0339-40, 1168-75) Undisputedly, in 2009 and 2010 alone, Lucky Cab terminated at least 11 employees just like Demeke, who falsified trip sheets. (JA-2141-42, 2146-49, 2152-53, 2158-62, 2165-66, 2183-88, 2199-201)

- Later on February 25, the Industrial, Technical and Professional Employees Union, Local 4873 ("Union") announced the existence of an organizing campaign directed at Lucky Cab's drivers, in a letter it hand-delivered to

management. The Union expressed its belief that "we are certain that you will respect your employee's [sic] right to participate in Union activity," but it did not identify any individual employee participants in its campaign. (JA-0725, 0883)

- Lucky Cab did respect its employees' rights. After the Union filed its petition on March 30, Lucky Cab promptly agreed to a stipulated Election Agreement for the holding of an election on May 6. (JA-0749)

- On March 8, Lucky Cab discharged Endale Hailu for falsifying his fares. He was counseled ***six separate times*** about this same misconduct over a period of eight months, including the issuance to him one month before his discharge of a ***final warning*** that future violations would not be tolerated. (JA-1134-54) Lucky Cab kept its word.

- On April 6, Melaku Tesema was discharged for a trip sheet falsification incident which occurred three days earlier on April 3. (JA-0891) Like Hailu, Tesema had previously been placed on a "final warning" for falsifying his trip sheet. (JA-0896-0907) Tesema testified that he intentionally falsified his trip sheet. (JA-0403) As noted, Lucky Cab discharged 12 other drivers for the same offense in the prior two years.

- On April 6, Assefa Kindeya was discharged for refueling his taxicab more than 30 minutes before the end of his shift on April 4. (JA-1155-67) Kindeya was aware of the wrongfulness of his conduct because he had been

disciplined for the same reason previously. (JA-0611) Lucky Cab also previously discharged another driver for the offense. (JA-0599, 2173-74)

- On April 21, Mesfin Hambamo was discharged after he ***twice*** failed to attend a class necessary for him to renew the Nevada Taxi Authority ("NTA") permit that allowed him to drive a taxi –without the permit, Hambamo was legally prohibited from driving a taxi. (JA-0342-43, 0611-12, 1177) Lucky Cab previously discharged another driver for the same reason. (JA-2139-40)

- On May 6, the election was held and Lucky Cab's employees chose not to be represented by the Union. (JA-0749-51)

1. Substantial Evidence Does Not Establish Management Knowledge Of Union Activities By Any Of The Six Drivers Prior To Their Terminations

It is axiomatic that if an employer does not know about an employee's union activities, then the employer could not have been motivated to act in response. In other words, without evidence of employer knowledge, the complaint cannot survive. *Tomatek, Inc.*, 333 NLRB 1350, 1355 (2001); *Stanford Linear Accelerator Center*, 328 NLRB 464 (1999). GC's claims concerning Lucky Cab's knowledge of the drivers' alleged Union activities have no merit. In fact, GC's brief shows nothing but complete reliance on speculation and innuendo, which GC cobbles together in an effort to prove knowledge where none exists.

First, there is no evidence that Lucky Cab knew at the time of their terminations that ***Geberselasa*** and ***Demeke*** had engaged in any Union activities whatsoever. In fact, it is undisputed that Lucky Cab was not informed about the existence of the Union's campaign until ***after*** both Geberselasa and Demeke were discharged. GC spins a yarn about unknown drivers coming forward to management once authorization cards began to be distributed in early February, although no evidence supporting that chronology exists. To the contrary, the only evidence of employee questions to management came from Desiree Dante, who explained that after some employees approached her about cards, she decided to conduct meetings to discuss the decision the Union was asking them to make. Dante specifically denied that any drivers spoke to her prior to the Union's February 25 correspondence, and no employee claimed to the contrary. (JA-0726) GC now rhetorically questions why employees would have waited to approach Dante about cards, assuming the existence of card signing in early February. (GC Brief p. 27) But the only question that arises out of Dante's testimony is why she would have waited to address the issue at employee meetings after the Union's correspondence was received, had she been alerted by questions about a campaign earlier. No employee testified about any question, discussion or reference to any manager about any cards or other Union organizing activities before February 25, when the Union itself announced its campaign. As described previously, the

employee participants in the Union's campaign agreed they would keep their involvement completely secret from management to prevent Lucky Cab from having an opportunity to respond. They succeeded.

The Board's fiction concerning management knowledge of Gerberselasa's and Demeke's participation in Union activities, of course, is complicated by Geberselasa's testimony that before her discharge she did not engage in any card signing activities whatsoever (JA-0468-69), and by the lack of testimony by Demeke that any manager or supervisor was aware of any of his discussions with drivers about the Union's campaign. This necessitates more elaborate storytelling, including the claim that on the day of her discharge Geberselasa arrived at work with authorization cards but was discharged before she could distribute them. (GC Brief at 8-9.) She allegedly "solicited drivers and encouraged them to sign cards" but was discharged "on the very day she had promised coworkers she would bring cards for them to sign." (GC Brief at 5 and 32.) GC cites no evidence that any Lucky Cab manager knew that Geberselasa had any cards on her, that she intended to distribute any of them or that she discussed giving them to any employees. And as for Demeke, the lack of any evidence supporting the GC's contention that Lucky Cab actually knew about his alleged activities speaks for itself.

The GC's contention about supposed discussions on Lucky Cab's property about the future potential distribution of cards completely disregards that

Gerbeslasa and Demeke, like the other individuals whose terminations are at issue, were drivers who had no job duties to perform on Company property; generally they were not present on Company property during their working time; and they spent minimal time there before picking up their cabs at the start of their shifts. Adding to the brief, infrequent opportunities to engage in any meaningful or detectable Union activities at the Company's facility, the drivers at issue are not native English speakers, they are not likely to discuss a private subject such as a secret organizing campaign in English in the vicinity of English speaking managers, and assuming they did their heavily accented, halting English would be challenging, at minimum, to understand.[1]

That GC is willing to make such outlandish and factually unsupported claims as the one in which management (i) somehow overheard Geberesala's private, momentary discussions with coworkers (ii) while waiting for her cab to drive up outside the Company's office at the beginning of her shift, (iii) in which she allegedly promised to distribute authorization cards at some future time long after other unidentified drivers allegedly already had begun distributing them, (iv) in English rather than her native language with other native speakers, (v) all despite the instruction that Geberseala and the other drivers claimed they received about maintaining the confidentiality of their activities, casts doubt on all the

[1] The drivers whose terminations are at issue testified through a professional translator at the underlying hearing.

"facts" he purports to cite. There is a reason for the allocation of a burden of proof in a case like this one, and it is to prevent such speculation and conjecture from overwhelming the basic facts supporting the reasons for termination.

The Board's assumption of management knowledge of a campaign prior to February 25 also raises internal contradictions that GC does not and cannot begin to address; for instance, why would Lucky Cab seek to retaliate against individuals for speaking cryptically about a campaign prior to their shifts, rather than pursuing those who actually were distributing cards? Why would Lucky Cab have refrained from any response to an organizing campaign if it was aware that card signing was going on? Particularly given GC's repeated claims that Lucky Cab was "plainly hostile to the Union's campaign" (GC Brief p. 29) why is there no evidence, or claim of any kind, of demonstrated hostility prior to the Company's receipt of the Union's own announcement of its campaign? And how could the drivers who stand to gain most from a finding of retaliation themselves claim that management could not have been aware of their Union activities prior to their discharges because they had been acting in secret? The fiction of management knowledge that has been asserted in this case cannot account for any of these contradictions. The facts that were disregarded by the Board, and supplanted by the fiction elucidated by the GC, are that no manager or supervisor of Lucky Cab observed any discussion or Union supporting conduct, at any time prior to February 25, by

any drivers whatsoever. The absence of evidence is overwhelming to GC's conclusory arguments, and fatal to the claims of retaliation as well.

Second, claims concerning management's knowledge of Union activity by ***Tesema***, ***Kindeya***, ***Hambamo*** and ***Hailu*** likewise are based on speculation that Union activities possibly might have been observed during discussions among the drivers at the facility. (JA-0105, 0121) Yet, GC provides no evidence that Lucky Cab managers and supervisors observed any of the alleged Union activities that these drivers admittedly hid from Lucky Cab and engaged in off-site or that any of these activities even occurred before the drivers were terminated. And no witness testified to the contrary, that any manager or supervisor could have known of the existence of Union activities by any of these four drivers. In the case of Tesema, Hambamo and Kindeya, they all ***denied*** that management could have known they were engaging in Union supporting or other protected, concerted activities. The Board erred by failing to credit their testimony and erred by substituting its false assumption of employer knowledge.

GC claims that Tesema, for his part, "campaigned for the Union, handing out authorization cards." (GC Brief at 5) Tesema, on the other hand, testified that he engaged exclusively in an "underground" campaign, in which all of his activities occurred in the privacy of his cab, away from Lucky Cab property, to avoid detention. (JA-0398-99, 419) Tesema also testified that he never discussed

the campaign with a manager or supervisor, never wore any Union insignia and did not otherwise identify himself as a Union supporter. (JA-0414)

GC claims that Hambamo "handed [cards] out at the airport." Whether he did or not, Lucky Cab knew nothing of the sort. According to Hambamo's own testimony, he worked "clandestinely" to organize the Union (JA-0358), engaged in Union activities offsite, "outside the compound of the Company" (JA-0358), did not discuss the Union with managers or supervisors (JA-0377-78), and did not circulate cards or talk with employees about the Union at Lucky Cab (JA-0363, 0378-79). The ALJ agreed with Lucky Cab on this point. (JA-0115.) There simply is no evidence that Lucky Cab knew about activities that Hambamo admittedly kept to himself and engaged in off-site.

GC claims that Kindeya "distributed cards in other areas of the Company's premises." (GC Brief at 5) However, there is no evidence that Lucky Cab knew about Kindeya's activities.

GC takes all of these alleged facts that drivers admit occurred off-site and distorts them by claiming that Lucky Cab's "facility soon became a hub of organizing activity." (GC Brief at 5) That statement is an empty conclusion that is not supported by evidence, and it flies in the face of the testimony of the drivers themselves and their own descriptions of the conduct in which they engaged prior to their terminations. In sum, GC failed to prove with substantial evidence that

Lucky Cab had knowledge of any of the discharged driver's Union activities. Thus, the Court should deny enforcement of the Board's decision.

2. GC Failed To Prove Retaliation Motivated The Discharges.

GC's purported evidence of animus consists of "contemporaneous violations of Section 8(a)(1), the suspicious timing of the discharges, and the pretextual explanations the Company provided for them." (GC Brief at 31) In other words, GC contends the Board's decision is based solely on management statements about the Union's campaign in general, no one of which was unlawful or otherwise improper, the coincidence of the terminations in connection with unknown but alleged Union activities, and assertions about alleged defects in the termination process. None of these establishes retaliation.

a. Lucky Cab's Lawful Expression Of Its Preference To Remain Union Free Does Not Demonstrate Animus Sufficient To Establish Retaliation

GC's argument supporting animus against the drivers in this case is predicated on the ALJ's conclusion that Lucky Cab allegedly "threaten[ed] employees with the futility of seeking union representation and loss of employment benefits and job security if they chose union representation." (JA 0102) This generic, but false, conclusion did not reflect on any of the drivers individually but arose out of lawful statements by Ms. Dante at employee meetings in March.

At the outset, it is hornbook law that Lucky Cab has the right to express its opposition to unionization by its workers and, thus, its decision to do so and to truthfully advise employees of the consequences of their choice in an election does not evidence animus. Section 8(c) of the Act "implements the First Amendment" to the U.S. Constitution, such that "an employer's free speech right to communicate his views to his employees is firmly established and cannot be infringed by a union or the Board." *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969). "[T]he enactment of Section 8(c) manifests a congressional intent to encourage free debate on issues driving labor and management." *Linn v. United Plant Guard Workers of Am. 114*, 383 U.S. 53, 62 (1965). Section 8(c) serves an essential function of allowing employers to present an alternative view and information that a union would not present and thereby assures employees are informed about their choice in an election. *See, e.g., Steam Press Holdings, Inc. v. Hawaii Teamsters*, 302 F.3d 998, 1009 (9th Cir. 2002) ("Collective bargaining will not work, nor will labor disputes be susceptible to resolution, unless both labor and management are able to exercise their right to engage in 'uninhibited, robust, and wide-open' debate"); *Americare Pine Lodge Nursing & Rehab. Ctr. v. NLRB*, 164 F.3d 867, 875 (4th Cir. 1999) ("'[P]ermitting the fullest freedom of expression by each party' nurtures a healthy and stable bargaining process"); *NLRB v. Lenkurt Elec. Co.*, 438 F.2d 1102, 1108 (9th Cir. 1971) ("It is highly desirable that the

employees involved in a union campaign should hear all sides of the question in order that they may exercise the informed and reasoned choice that is their right."); *McGraw-Edison Co. v. NLRB*, 419 F.2d 67, 70 (8th Cir. 1969) ("recognizing that labor and management, particularly during organizational campaigns, ordinarily 'are allowed great latitude in freedom of expression'"); *Southwire Co. v. NLRB*, 383 F.2d 235, 241 (5th Cir. 1967) ("The guaranty of freedom of speech and assembly to the employer and to the union goes to the heart of the contest over whether an employee wishes to join a union").

The ***unrefuted*** testimony by Ms. Dante was that she urged employees to educate themselves, talk to coworkers and to "make a decision that they felt was best for them" in connection with the Union's campaign. (JA-0729) In fact, employees who attended the meetings during which Dante spoke testified confirming that Dante never told employees that they would lose benefits and never predicted the outcome of the election. (JA-0650, 0685-86) In her statements, and in a written communication to employees on the same subject, Ms. Dante reviewed the benefits that Lucky Cab provided and compared them to the benefits offered at other, Union represented employers. In doing so, she demonstrated what the employees had already achieved working directly with management, without the interference of an outside labor organization, and encouraged them to continue to work together in the same manner. None of these

statements constituted a threat to revoke benefits in the event of an election or based on any other contingency, and certainly none of the statements evidenced an intention to root out and terminate employees who supported the Union or engaged in organizational activities.

The absence of animus, in fact, is evidenced by the meetings and their results. To be sure, some drivers spoke up during the meetings. (JA-0731) Some recounted their experiences working for other cab companies and some voiced opinions concerning Union representation. (*Id.*) Drivers such as Yale Mallinger, Jimmy Grayson, Himeney Encina, and Yusuf Mohamed were vocal. (*Id.*) *Ms.* Dante testified that among those, Mr. Mohamed in particular advocated for Union representation. *Id.* There were no threats directed at Mohamed, and in fact Mohamed, Encina, and Mallinger all continued to be employed by Lucky Cab after the hearing below. (JA-0733) Aside from these meetings, drivers visited Ms. Dante to express their support for or opposition to the Union, and GC has pointed to no evidence to show that any of these drivers were intimidated by Dante or that she ever threatened them. (JA-0732-0733.) Importantly, two of those who supported the Union vocally to Ms. Dante still work for Lucky Cab. (*Id.*) If Lucky Cab harbored the type of Union animus that GC claims in this case, vocal Union supporters would never have visited Dante's office and conveyed that support; the GC necessarily would contend such employees would have been terminated. That

other drivers engaged in Union supporting activities with management's knowledge or expressed their support for the Union, and were not subjected to any adverse action, refutes GC's conjecture that the six drivers were terminated because of their alleged, but unknown Union support.

b. The Discharges Occurred At Times Proximate To The Drivers' Acknowledged Misconduct, And Were in No Way Connected To Protected Activities.

GC makes much of the timing of the discharges, which in fact proves nothing.[2] That the six drivers engaged in the conduct for which they were terminated at the same time they allegedly were engaging in Union activities does not immunize the drivers from discipline and certainly does not mean that the discharge decisions must have been based upon an illegal motive. This is especially true in this case where substantial evidence does not prove that Lucky Cab had any knowledge of the six driver's Union activities.

Regardless, as explained above, two of the drivers were discharged ***before*** Lucky Cab had any knowledge of the organizing campaign and four were discharged at times when Lucky Cab did not know about their alleged Union activities. Notably, in the cases on which GC relies to argue that the timing of the discharges may support an inference of animus, there was evidence that the

[2] The Board claims that the six discharges "eviscerated the Union's organizing committee during the final months of its campaign," but not surprisingly cites no record evidence to prove this point.

employer was aware of the concerted activities. No such evidence is present here. Moreover, the terminations were legitimately timed within days of the documented infractions and were not proximately related to any known Union activity.

GC continues to perpetuate the ALJ's belief that there were an "unusually high number of discharges in a relatively short period before the election." (*Id.*) GC has the audacity to claim that Lucky Cab "only underscores" the point simply because Lucky Cab proved that in at least five months in 2010, ***at least*** two drivers were terminated per month for reasons substantially similar to those at issue here. GC responds by claiming that between February 24 and April 20, Lucky Cab allegedly discharged nine drivers. This number of discharges can hardly be described as "unusually high," especially given Lucky Cab's history and the number of drivers working for Lucky Cab.

c. The Six Discharge Decisions Were Not Pretextual.

GC appears to forget that there are six separate drivers at issue in this case, all presenting different facts surrounding their discharges. Thus, to establish pretext, GC must do so for each driver. He fails to do so.

(1) There Was No Disparate Treatment Of The Drivers.

To prove disparate treatment, GC has the burden of showing that the comparators engaged in the same offenses as each of the six drivers. *See Central Valley Meat*, 318 NLRB 245, 249 (2006). GC failed to meet this burden. While

he attempts to confuse this Court by relying on instances of discipline short of discharge in a variety of different circumstances, these individuals are not proper comparators because they did not engage in the ***same*** misconduct.

With respect to the discharge of ***Geberselasa*** for picking up passengers on two occasions in a geographically restricted area, GC claims that an unnamed driver also engaged in the same misconduct "and was not so much as warned for doing so." Yet, GC's evidence only shows that this driver allegedly violated his geographic restrictions, not that the employee was never disciplined for it; the evidence on the latter point is not in the record. The basis for the claim of disparate treatment in Geberselasa's case, consequently, is unestablished. Of course, GC apparently finds it unimportant that Geberselasa testified enthusiastically about her repeated violations of Nevada law and Lucky Cab policies (JA-0475, 0477, 0482-83, 0485-88, 0501-05), and ignores evidence that Lucky Cab discharged another driver for also violating the geographic medallion restrictions. (JA-2169-72)

With respect to ***Demeke*** and ***Tesema***, who were discharged for falsifying their trip sheets by failing to report their breaks, the individuals on whom GC relies for his claim of disparate treatment also are not proper comparators. Specifically, on March 18, 2011, Fidel Luna-Banuelos, received a "final warning" for failing to record a 30 minute break on his trip sheet (JA-1449, 1460); on December 3, 2010,

Bereket Eyob received a "final warning" for failing to record a break on his trip sheet (JA-1476); on June 15, 2010, Alazar Woldemariam received a "final warning" for failing to record his lunch break on his trip sheet (JA-1724); on January 15, 2011, Yihenew Mekonnen received a "final warning" for failing to record breaks on his trip sheet (JA-1738); on September 14, 2010, Lutz Blocking received a "final warning" for failing to record a 20 minute break on his trip sheet (JA-1771); and on June 11, 2010, Robel Begashaw received a "final warning" for failing to record a 50 minute break on his trip sheet (JA-2052). There is nothing in the record demonstrating that any of these drivers had been disciplined for this infraction in the past, which means they are not proper comparators, particularly with respect to Tesema, who was on a final warning for failing to record lunch break at the time of his discharge. (JA-0896-907) As previously explained, Lucky Cab has discharged at least 11 other drivers for engaging in the same misconduct.

Hailu was discharged for falsification of trip sheets after he recorded fares that did not match Lucky Cab's trip logs resulting in Hailu essentially stealing fares from Lucky Cab. Kelifa Abdo's conduct, which consisted of failing to record his telephone number on his trip sheets, can hardly be viewed as similar to Hailu's. (JA-1185-233) None of GC's alleged comparators reflect that they engaged in the same misconduct and, thus, GC's argument must be rejected. Lucky Cab proved

that it discharged another driver for the same misconduct that resulted in Hailus termination. (JA-2169-72)

GC claims that Lucky Cab treated ***Kindeya*** worse than other drivers who also refueled their taxis early, such as Bereket Eyob, Michael Berichon, Lutz Bloching and Frank Buettgenbach. They are not proper comparators, however, because there is no evidence that any had been previously warned for engaging in the same misconduct, as Kindeya had been. As noted above, Lucky Cab had previously disciplined Kindeya for refueling too early. (JA-0611) The four other drivers did not have prior warnings on their record. Lucky Cab previously discharged another driver for refueling his taxi too early. (JA-0599, 2173-74)

Finally, GC claims that ***Hambamo*** was discharged for deliberately missing two NTA mandated safety classes and deliberately failing to maintain his permit, but that Abraham Worke, Metekya Absu and Demeke all had their permits indefinitely suspended for also missing their second class. GC is wrong. Absu was on a leave of absence at the time he missed his class (JA-0346) and, therefore, unlike Hambamo, was not even available for work at the time. Another, Demeke, was not known to Gerace, who noted that Demeke's permit suspension may have been overlooked because of its expiration on November 4, 2009, about one month after Gerace was hired. (JA-0316) There is no evidence about the circumstances surrounding the permit suspension of Worke and, thus, there is not enough

information about him to determine if he is a proper comparator.[3] Regardless, Lucky Cab proved that it has discharged at least one other driver for the same misconduct. (JA 2139-40)

In sum, a careful review of these alleged comparators' disciplinary records reflects drivers' paperwork errors rather than issues of falsification or suspension of a driver's TA permit that are at issue here. GC's argument that the files contain discipline for infractions identical to those committed by the six drivers in this case is simply wrong. Lucky Cab does not treat paperwork errors or productivity counselings the same as it does for intentional violation of known work rules. Most of GC's evidence reflects technical paperwork errors for which it found progressive discipline, rather than termination, more appropriate. There are significant differences between the offenses cited by GC and those committed by the six drivers, which GC simply ignores. Indeed, there is no evidence by GC that the alleged comparators engaged in any deceitful or fraudulent conduct. For this reason alone, they are not proper comparators.

(2) Lucky Cab Did Not Provide Shifting Reasons For Discharge Decisions.

GC contends that Lucky Cab provided shifting reasons for the discharges of ***Geberselasa***, ***Kindeya*** and ***Hailu***, but not any of the other three discharges. GC's

[3] This argument should not trouble GC given that the ALJ rejected much of Lucky Cab's comparator evidence by claiming that she needed more information to "formulate concrete comparisons." (JA-0151)

claim that Lucky Cab provided shifting reasons in those cases is based on his distorted reading of cited testimony.

Gerace did not offer "new, previously undocumented justifications" for his discharge decisions nor is there anything in his testimony suggesting an "abandonment of reasons [Lucky Cab] initially proffered." With respect to Geberselasa, when asked why Gerace discharged her instead of giving her a final written warning, Gerace stated that Geberselasa was "very combative" and "aggressive," and, thus, did not want to deal with her anymore. (JA 609-10) That is not providing a new reason for her discharge – Gerace simply explained why he was not inclined to give her a second chance.

GC claims that Gerace testified that Hailu "lied about passenger pick-up information." The cited testimony says no such thing. Instead, Gerace testified that Hailu "lied about the amount of fares, the places he picked up, the times that he picked up." (JA 610) Lucky Cab is at a loss as to how this testimony can be viewed as a shifting reason given that this is precisely the reason for Hailu's termination – providing false information (such as fare amounts and pick-up times) on his trip sheet to cover up that he was pocketing money that should have been turned over to Lucky Cab.

Finally, Gerace never testified that Lucky Cab discharged Kindeya because he was "combative." (JA 0610-0611) Instead, Gerace simply was describing

Kindeya as an employee. Nowhere in his testimony did Gerace waiver from the basis for his decision to discharge Kindeya.

(3) Each Driver Had An Opportunity To Respond.

Although there is no dispute that all six drivers had an opportunity to respond to the allegations against them prior to their discharges, GC claims that Lucky Cab should have done more. (GC Brief at 39-41) Notably, GC provides no explanation as to what Lucky Cab would have learned through a more detailed investigation that might have changed its decision to discharge any of the drivers. Regardless, that Lucky Cab did not conduct its investigation in a manner that would satisfy GC and give the drivers more elaborate opportunities to respond to the allegations against them does not support an inference of animus. *See, e.g., Chartwells, Comass Group, USA Inc.*, 342 NLRB 1155, 1158 (2004) (unlawful motivation cannot be established by showing that an employer "does not pursue an investigation in some preferred manner"). Lucky Cab gave each driver an adequate opportunity to respond. That is what its policy and practice required.

In sum, GC failed to prove that each of Lucky Cab's discharge decisions were pretextual and proffered to cover up unlawful discrimination. All six discharges were legitimate and nondiscriminatory and, thus, the Court should deny enforcement of the Board's order.

3. Lucky Cab Would Have Terminated The Drivers Even In The Absence Of Union Activities.

Because GC failed to meet his burden of proving a *prima facie* case of discrimination with respect to each of the six discharges, then the inquiry proceeds no further and the Court need not consider Lucky Cab's defense that it would have discharged each driver regardless of their alleged Union activities. It is only if GC meets his *prima facie* burden that the Court should consider Lucky Cab's affirmative defense and in that case, the Court should only consider the defense as to the discharge for which GC met his *prima facie* burden. (In other words, if GC articulated a *prima facie* case for only one driver, which he did not do, then the Court need not consider Lucky Cab's defense for the remaining five drivers because the inquiry has ended for those drivers.)

As previously explained, there has been no violation of the Act because "the same action would have taken place even in the absence of the protected conduct." *Wright Line*, 251 NLRB at 1089. In response, GC argues, in a conclusory fashion, that because he believes that pretext has been established, then necessarily, Lucky Cab has failed to demonstrate that it would have discharged the six drivers even in the absence of the campaign. GC is wrong. As noted above, GC failed to prove that Lucky Cab's stated reason for each of the six discharges was a pretext to cover up discrimination. Moreover, GC has failed to rebut Lucky Cab's evidence ***as to***

each driver that it would have terminated the drivers even in the absence of the ***specific driver's*** protected concerted activities.

a. Geberselasa

Geberselasa conceded that she violated the terms of her geo medallion and falsified her trip sheets, in violation of NRS 706.8844, 706.8849 and Lucky Cab policies. (JA-0791-874, 1084-89)[4] In one case that is particularly similar to Geberselasa's, Stanley Milano was terminated in August 2009 for picking up a customer in a geographically restricted area and entering inaccurate information on his trip sheet about the ride. (JA-2169-72)

The Board incorrectly concluded that management had tolerated similar misconduct by Gebersealas involving geographic medallion violations in the past, something that was specifically disproven at the hearing. Indeed, Geberselasa did not identify a single manager or supervisor who allegedly knew she previously had picked up customers in a restricted area. (*See* JA-0504-05)

GC responds by claiming that Lucky Cab did not consistently enforce the geographic restriction rule and points to the unnamed driver discussed above. (GC Brief at 47-48) However, as stated, there is nothing in the record evidencing that

[4] In fact, Geberselasa testified enthusiastically about her repeated violations of Nevada law and Lucky Cab policies, including violating her geo medallion, long hauling customers, ignoring taxicab stands to pick up customers, picking up customers off the street, and even falsifying an accident report. (JA-0475, 0477, 0482-83, 0485-88, 0501-05)

this person was never disciplined for violating the geographic restriction. Thus, GC cannot rely on this alleged comparator to support his claim of inconsistent enforcement.

b. Demeke and Tesema

As described above, Tesema and Demeke were terminated for trip sheet falsification when they failed to record their breaks. (JA-0226, 0244, 0611, 0891, 1168-75) Both had been warned that failing to record breaks was considered an act of falsification that could result in their terminations, and Tesema was working under a written final warning for that violation at the time of the recurrence. At least 11 other drivers were terminated in the prior two years for failing to record their breaks in analogous cases: (JA-2141-42, 2146-49, 2152-53, 2158-62, 2165-66, 2183-88, 2199-201)

As discussed above, the comparators on which GC relies to prove inconsistent enforcement of the rule requiring drivers to accurately report their lunch breaks on their trip sheets are not proper comparators because the record does not show that any of these drivers had not been disciplined for this infraction in the past, unlike Tesema who had already been on a final warning.

c. Hailu

Hailu was terminated for falsifying fares on his trip sheets. As described above, Lucky Cab has terminated many other drivers for falsifying trip sheets.

Moreover, Stanley Milano was terminated in August 2009 for picking up a customer in a geographically restricted area and entering inaccurate information on his trip sheet about the ride. (JA-2169-72)

d. Kindeya

Kindeya was terminated for refueling 30 minutes early under circumstances where he previously was warned about this same misconduct. Lucky Cab has terminated other drivers for violating its rule in this respect. For instance, former driver James Nguyen was terminated in January 2011 for refueling his taxicab early. (JA-0599, 2173-74)

e. Hambamo

Hambamo was terminated after his NTA permit was indefinitely suspended because he missed two consecutively scheduled mandatory safety classes. The NTA is clear that he could not be employed with a suspended permit. Lucky Cab's rule regarding termination in these circumstances is specifically referenced in its written rules. (JA-0822) In at least one documented prior case, former driver Nikolay Atanasov was terminated in October 2009 for failing to maintain a valid NTA permit.[5] (JA-2139-40)

[5] As noted above, GC's claim that Lucky Cab improperly "altered" JA-2140 to bolster its evidence supporting its discharge of Hambamo is specious. GC is well aware that the date incorrectly printed on the document was due to the printing of numerous documents on that date to respond to GC's overbroad and burdensome subpoena.

In sum, the evidence demonstrates that Lucky Cab enforces its policies concerning recording of breaks and early refueling particularly strongly. GC's burden is to prove that Lucky Cab selected discharge for the drivers named in the Complaint in retaliation for their participation in an organizing campaign. GC failed to meet that burden. Where an employer such as Lucky Cab provides evidence that it has discharged others for violating the same policies leading to the discharge of the purported victims of retaliation, there can be no violation of the Act. *See, e.g., Eldeco, Inc. v. NLRB*, 132 F.3d 1007 (4th Cir. 2007); *Asarco, Inc. v. NLRB*, 86 F.3d 1401 (5th Cir. 1996). The Board's contrary Decision with respect to the terminations of all of the drivers should be reversed.

B. Section 10(c) Of The Act Precludes Any Remedy For Five Of The Six Terminated Drivers.

GC dismisses Lucky Cab's argument that Section 10(c) precludes any remedy for five drivers simply because he assumes that this Court will uphold the discharges. What he fails to recognize is that all five of the drivers at issue engaged in the conduct for which they were terminated and GC does not argue to the contrary. (JA-0475, 0477, 0482-83, 0485-88, 0501-03, 0504-05 (Gebreselasa admitting to her conduct) and JA-0891, 1092-101, 1168-69 (Demeke, Hailu and Tesema falsifying their trip sheets).) And in the case of Hambamo, it defies logic for the NLRB to even suggest that he should be reinstated to a position allowing

him to drive a taxicab when he failed to maintain his NTA permit—the very document that enabled him to work as a taxicab driver.

Not one of these terminated drivers argued that they did not engage in the misconduct for which they were terminated. Accordingly, the Board erred in providing these drivers with any remedy.

III. CONCLUSION

For the foregoing reasons, the Court should grant the Company's Petition for Review and deny enforcement of the Board's Decision.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I, Libby Henninger, do hereby certify that this brief complies with Rule 32(a)(5) and (7)(B) of the Federal Rules of Appellate procedure. The brief utilizes a 14-point proportionally spaced face for text. The brief contains 6,931 words according to Microsoft Office Word 2010, the word-processing system used to prepare the brief.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing *Reply Brief of Petitioner/Cross-Respondent Lucky Cab Company* was electronically filed on this 30th day of January 2015. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's electronic filing system.

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